RECENT CASES.

ADMIRALTY — MARITIME LIENS — JURISDICTION. — In a suit to enforce a lien given by a State statute, for repairs to a vessel, *held*, that the transaction is maritime in its nature and the State courts have not jurisdiction. *State* v. *Cox & Sons*, 44 Atl. Rep. (N. J., Sup. Ct.).

The Constitution of the United States, art. 3, sec. 2, declares that "the judicial power shall extend to all cases in admiralty and maritime jurisdiction." An act of Congress provides that the district courts of the United States shall have exclusive jurisdiction of such causes. U. S. Rev. St., § 563. Despite this statute it was formerly held that proceedings such as those in the principal case were valid, on the ground that although Congress was empowered to regulate the matter of repairs to vessels in home ports it had not done so; that until Congress did act, the States had the right to regulate these matters; and that, therefore, State statutes creating liens and providing for their enforcement in State courts were valid. *Randall* v. *Roche*, 30 N. J. Law, 220; *Atlantic Works* v. *Tug Glide*, 150 Mass. 525. But such a contract is clearly maritime in its nature. Accordingly, the Supreme Court has since held that although the State legislatures may regulate the rights of material-men furnishing necessaries to vessels, so long as Congress does not interpose to regulate the subject, yet State law cannot take the contract out of the exclusive domain of admiralty jurisdiction. *The Lottawanna*, 21 Wall. 558; *The Glide*, 167 U. S. 606. The principal case is entirely sound in adopting this view.

AGENCY — INSANITY OF PRINCIPAL — BURDEN OF PROOF. — The defendant authorized X to execute a mortgage on her property, and afterwards became insane. X, with knowledge of the insanity, made the mortgage. *Held*, that the burden is on the mortgagee to show that he had no knowledge of the insanity at the time of the execution of the mortgage. *Merritt* v. *Merritt*, 59 N. Y. Supp. 357 (Sup. Ct., App. Div., First Dept.).

Communication by a principal to his agent of a revocation of authority terminates the agency, and thereafter the principal can be bound by the acts of his former agent only upon some ground of estoppel. *Robertson* v. *Cloud*, 47 Miss. 208. Death of the principal, on the other hand, puts an end to the relation at once, and future acts of the former agent are ineffectual to bind the representatives of the deceased, although the agent and persons dealing with him have acted in good faith. *Harper* v. *Little*, 2 Me. 14. Insanity of the principal presents an intermediate case. He can or cannot act for himself according as his insanity is partial or total. And so the analogy of revocation is properly followed and the existence of the agency made to depend on whether the agent has knowledge that his principal is so deranged as to make it improper for him to continue to exercise his authority. *Drew* v. *Nunn*, 4 Q. B. D. 661. Under this rule the agency in the principal case was terminated, and the court rightly held that it lay with the plaintiff to show that the defendant was estopped to deny the agency. But see *contra*, *Campbell* v. *Hooper*, 3 Sm. & G. 153.

AGENCY — TORTS OF SERVANT — MOTIVE. — The defendant's servant in performing his work as janitor moved a table on which the plaintiff's ladder was resting, and as a result the plaintiff was seriously injured. *Held*, that the defendant's liability depends upon the motive of the servant in doing the act. *Lloyd* v. *Nelson, etc. Co.*, 54 N. E. Rep. 471 (Ohio).

The court in this case accepts the well-settled rule that the master's liability depends upon whether the servant was acting in the course of his employment. *Alabama, etc. R. R. Co.* v. *Frazier*, 93 Ala. 45; *Philadelphia, etc. R. R. Co.* v. *Derby*, 14 How. 468. And in holding that an act may or may not be in the course of employment according to the secret intention by which the servant was actuated in doing it, the principal case is not without support. *Wright* v. *Wilcox*, 19 Wend. 343; *Wood* v. *Detroit, etc. Ry. Co.*, 52 Mich. 402. On the other hand, it has been suggested that the question is purely one of fact, and that the test to be applied is whether a reasonable third party would suppose the act to be within the scope of employment; that if it really was a way of doing the master's business, however ill-advised, or from what motives adopted, the master should be held liable. *Toledo, etc. Ry. Co.* v. *Harmon*, 47 Ill. 298; *Billman* v. *Indianapolis, etc. R. R. Co.*, 76 Ind. 166. The latter view better accords with the general principles of agency and tends to bring the whole subject into greater unity by eliminating where possible the consideration of the agent's intent.

BANKRUPTCY — DISCHARGE — DESTRUCTION OF ACCOUNT BOOKS. — Prior to the Bankruptcy Act of 1898, an insolvent merchant destroyed his books of account with intent to defraud his creditors. *Held*, that this does not constitute a ground for refusing him a discharge in bankruptcy proceedings under the act, since such destruction could not have been "in contemplation of bankruptcy." *Re Hirsch*, 96 Fed. Rep. 468 (Dist. Ct., Tenn.).

The Bankruptcy Act of 1867, § 29, provided in express terms that to bar discharge the destruction of books must be subsequent to the passage of the act. But it seems that the omission so to provide in the Bankruptcy Act of 1898, § 14, may be supplied by construction. That act requires that the destruction must be "in contemplation of bankruptcy," a provision not included in the former act. And this phrase, in construing bankruptcy statutes, has always been clearly distinguished from the phrase "in contemplation of insolvency." *Buckingham* v. *McLean*, 13 How. 151; *Re Black*, 2 Ben. 196; *Re Jones*, 2 Lowell, 451. Hence the expectation of actual legal bankruptcy seems a prerequisite to refusing a discharge under the present law. A debtor, although insolvent, cannot be said to be in contemplation of bankruptcy at a time when the bankruptcy law is not in existence. *Re Holtz*, 1 Nat. Bank. News, 204; *Re Stark*, *Id.* 232. Accordingly, the ruling in the principal case commends itself as sound interpretation. In accord are *Re Holman*, 92 Fed. Rep. 512 (Dist. Ct., Iowa); *Sellers* v. *Bell*, 94 Fed. Rep. 801 (C. C. A.).

BANKRUPTCY — EXAMINATION OF BANKRUPT — INCRIMINATING EVIDENCE. — *Held*, that a person under examination before a referee in bankruptcy is not obliged to answer questions which might tend to incriminate him, notwithstanding sec. 7 of the Bankrupt Act, which provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." *In re Rosser*, 96 Fed. Rep. 305 (Dist. Ct., Mo.). See NOTES.

BILLS AND NOTES — CERTIFICATES OF DEPOSIT. — *Held*, that a certificate of deposit payable "on return of this certificate properly indorsed," is not due until payment is actually demanded. *Hillsinger* v. *Georgia R. R. Bank*, 33 S. E. Rep. 985 (Ga.).

An earlier Georgia decision holds that a certificate of deposit payable "on call" is equivalent to a negotiable promissory note payable on demand and so due at once. *Lyuch* v. *Goldsmith*, 64 Ga. 42. The court distinguishes the principal case on the ground that the words "on return of this certificate" create a condition precedent, while the words "on call" do not. But in all such instruments, the words "on return of this instrument" are implied if not expressed, and are held to mean only that the instrument must be given up on settlement. *Smilie* v. *Stevens*, 39 Vt. 315. The real question is whether the rule, that negotiable demand notes are due at once, should apply to certificates of deposit. It seems on principle that it should, and many courts have so held. *Hunt* v. *Divine*, 37 Ill. 137. Others, making a distinction on grounds of policy, have held that certificates of deposit, like bank notes, are payable only after actual demand. *Bellows Falls Bank* v. *Rutland County Bank*, 40 Vt. 377. In the principal case, too, while desiring not to overrule the earlier case, the court evidently shrinks from the practical consequences of applying the logical analogy.

BILLS AND NOTES — FORGED CHECKS — NEGLIGENCE OF DEPOSITOR. — The defendant bank paid checks forged by the plaintiff's clerk, who was also entrusted with the examination of the returned pass-book and vouchers. The plaintiff neglected personally to examine the pass-book, and failed to discover the forgeries for more than two years. *Held*, that the plaintiff cannot recover from the defendant the amount paid on the checks. *Myers* v. *Southwestern Nat. Bank*, 44 Atl. Rep. 280 (Pa.).

The depositor owes a duty to the bank to use due diligence in examining the returned pass-book and vouchers. If he, or his clerk entrusted with the examination, uses such diligence, whether it results in the discovery of the forgery or not, the depositor can recover from the bank the sums paid out. *Frank* v. *Chemical Nat. Bank*, 84 N. Y. 213. If, however, the examining clerk is the forger, as in the principal case, and consequently conceals the results of the examination from the depositor, the bank ought not to be held liable. *Birmingham First Nat. Bank* v. *Allen*, 100 Ala. 476. For since the clerk is the agent of the depositor for the purpose of examining the pass-book, the rules of agency require that the master should be liable for his servant's neglect or misconduct to the prejudice of others. Accordingly, the principal case is supported by the great weight of authority. *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96; *Dana* v. *National Bank of Republic*, 132 Mass. 156.

CARRIERS — LIABILITY FOR BAGGAGE. — A travelling salesmen checked as his own baggage certain trunks of samples belonging to his employer, the carrier having knowledge of their contents. *Held*, that the owner of the goods can recover for their loss. *Talcott* v. *Wabash R. R. Co.*, 54 N. E. Rep. 1 (N. Y.).

A carrier's liability for baggage arises from the purely personal relation existing between the carrier and the passenger. Accordingly, it is held that when a passenger checks as his baggage the personal effects of another, the latter cannot hold the carrier for a loss, since the liability was only assumed toward the passenger. *Becher* v. *Great Eastern R. R.*, 5 Q. B. D. 241; *Meux* v. *Great Eastern R. R.*, [1895] 2 Q. B. D. 387. Applying this reasoning to the principal case, the owner ought not to have been allowed a recovery, since an absolute liability had not been created as between the carrier and him. On the same ground the case finds no support in those decisions which hold the carrier to a liability when he has received as baggage what he knew was not baggage. *Hannibal R. R.* v. *Swift*, 12 Wall. 262; *Toledo, etc. R. R. Co.* v. *Dages, etc. Co.*, 57 Ohio St. 38. There again the waiver can only operate in favor of the passenger.

CONFLICT OF LAW — CONTRACT — LOCAL LAW APPLICABLE. — In the South African Republic the defendant contracted not to engage in the brewing business in any part of South Africa for five years. *Held*, that the contract is void under the law of the South African Republic. *South African Breweries. Ltd*, v. *King*, [1899] 2 Ch. D. 173. See NOTES.

CONSTITUTIONAL LAW — THIRTEENTH AMENDMENT — INVOLUNTARY SERVITUDE. — The complainants were sailors and were forcibly detained and compelled to work on board an American vessel under unexpired contracts for their services. *Held*, that they are not being subjected to involuntary servitude within the meaning of the Thirteenth Amendment. *In re Chung Fat*, 96 Fed. Rep. 202 (Dist. Ct., Wash.).

Although the Thirteenth Amendment is not limited in its operation to negro slavery and includes in general all kinds of involuntary servitude, this case is right in holding that it does not apply to the forced performance by sailors of their contracts. *Robertson* v. *Baldwin*, 165 U. S. 275. For centuries all maritime nations have recognized the necessity of compelling the performance of such contracts. The Constitution and Amendments must be read with reference to such facts as this, and it is safe to say that the broadly stated guaranty of personal liberty in the Thirteenth Amendment was not intended to apply to this well-recognized and salutary exception to the ordinary rule as to contracts for personal services. *Robertson* v. *Baldwin, supra*, 281. See 10 HARV. LAW REV. 515.

CRIMINAL LAW — BURGLARY — CONSENT. — The defendant, "for detective purposes," was incited by a town marshal to commit a burglary, and was furnished with a key to the premises by a clerk. The proprietor had knowledge of the intended burglary, but took no steps to prevent it. *Held*, that the defendant was rightly convicted of burglary. *State* v. *Abley*, 80 N. W. Rep. 225 (Iowa). See NOTES.

CRIMINAL LAW — BURGLARY — ENTRY. — The defendant bored holes into a granary and stole the wheat which ran out. *Held*, that the entry was sufficient to sustain a charge of burglary. *State* v. *Crawford*, 80 N. W. Rep. 193 (N. D.).

This decision is in accord with the only other case directly in point. *Walker* v. *State*, 63 Ala. 49. But on principle it may be questioned whether a correct view of the nature of the defendant's act was taken. It is well settled that no entry occurs unless the instrument is intended for the purpose of taking property, or committing some ulterior felony. *Rex* v. *Hughes*, 1 Leach, 406; *Regina* v. *O'Brien*, 4 Cox C. C. 398; 2 Bish. Cr. L., 7th ed., § 93. In this case the instrument was intended only to effect an opening, and not to secure the goods, the force of gravity being relied upon to put the grain in the defendant's possession. Whether the auger passed within or not was a matter of indifference to him. It seems, then, that there was not a sufficient breaking to constitute an entry within the technical meaning of that term.

CRIMINAL LAW — FALSE PRETENCES. — *Held*, that a conviction for obtaining money by false pretences is valid if the pretences did in fact deceive, even though they would not have deceived an ordinary man, or could have been guarded against by ordinary care. *Lafler* v. *State*, 54 N. W. Rep. 439 (Ind.).

This case overrules a series of cases in Indiana holding that to support a conviction, the false pretences must be such as are likely to deceive an ordinary man. *State* v. *Burnett*, 119 Ind. 392; *Shaffer* v. *State*, 100 Ind. 365. But it is in accord with the present English law, and with most of the authorities in the United States. *Regina* v. *Wooley*, 1 Den. C. C. 559; *People* v. *Cole*, 65 Hun. 624. Moreover, it is unquestionably correct, on principle, for every element which the statutes seek to punish is as much present when the one deceived is weak or careless as when he is a man of ordinary intelligence and prudence. Hence objection may likewise be taken to a Massachusetts decision to the effect that the false pretence is not indictable if the one deceived had the same means of information that the party deceiving him had. *Commonwealth* v. *Norton*, 93 Mass. 266. The force of this case has, however, been somewhat weakened by a later criticism. *Commonwealth* v. *Mulrey*, 170 Mass. 103.

EQUITY — SUBROGATION — VOLUNTEER. — The plaintiff thinking, under a mistake of law, that he had a valid mortgage on the defendant's land, paid off a prior mortgage. *Held*, that he is not entitled to be subrogated to the rights of the prior mortgagee. *Brown* v. *Rouse*, 58 Pac. Rep. 267 (Cal., Sup. Ct.). See NOTES.

EVIDENCE — ADMISSIBILITY OF EVIDENCE ILLEGALLY OBTAINED. — On appeal from an order for deportation of Chinese based on private letters seized by customs officials, *held*, that the order is reversed, since the only evidence was illegally obtained, and hence inadmissible. *United States* v. *Wong Quong Wong*, 94 Fed. Rep. 832 (Dist. Ct., Vt.). See NOTES.

EVIDENCE — IMPEACHING WITNESS — PREVIOUS INCONSISTENT STATEMENTS. — *Held*, that a witness cannot be impeached by proof of a previous statement inconsistent with his testimony, unless he has first been asked whether he made such a statement, his attention being called to the time, place, and circumstances of it. *Rice* v. *Rice*, 60 N. Y. Supp. 97 (Sup. Ct., App. Div., Second Dept).

The strict rule laid down in this case is supported by the great weight of authority. *Pendleton* v. *Empire Co.*, 19 N. Y. 13; *Jaspers* v. *Lano*, 17 Minn. 296; 1 Greenl. Ev., 16th ed., § 462. In a few jurisdictions it is unnecessary to ask the witness about the alleged inconsistent statement before offering direct testimony to prove it; but he may be recalled afterwards to explain or deny it. *Gould* v. *Norfolk Lead Co.*, 63 Mass. 338; *Cook* v. *Brown*, 34 N. H. 460. Without defending the unnecessary looseness of the latter doctrine, it may be suggested that the rule adopted in the principal case is too narrow and technical. The matter seems to be one which the law might safely leave to the sound discretion of the trial judge to be settled according to the circumstances in each case. *Hedge* v. *Clapp*, 22 Conn. 262; *Walden* v. *Finch*, 70 Pa. St. 460. A hard and fast rule is likely to be used for unfair purposes, and moreover adds an unnecessary complication to a very complicated subject.

INSURANCE — LIFE INSURANCE — RIGHTS IN SURPLUS. — The company's charter provided that after the deduction of a sufficient amount to cover outstanding obligations, an equitable share of the surplus be credited to each policy holder. The plaintiff's policy provided that the holder should be entitled to participate in the distribution of the surplus according to such methods as the directors might adopt. *Held*, that the plaintiff is not entitled to an equitable share of the whole surplus, but only of that amount which the directors determined upon for distribution. *Greff* v. *Equitable Life Assurance Society*, 54 N. E. Rep. 712 (N. Y.). See NOTES.

MORTGAGES — TACKING — KNOWLEDGE OF ONE OF SEVERAL JOINT MORTGAGEES. — One of several joint mortgagees made subsequent advances on a first mortgage, with knowledge of an intervening mortgage. *Held*, that the intervening mortgage is not postponed to the subsequent advance. *Freeman* v. *Laing* [1899] 2 Ch. D. 355.

The case is undoubtedly correct on theory, though there are but few decisions on the point. Where neither mortgage is recorded, it is well settled that a mortgagee making subsequent advances on a first mortgage in ignorance of an intervening second mortgage is entitled to repayment of the subsequent advance in priority to the intervening mortgage. *Boswell* v. *Goodwin*, 31 Conn. 74; *McDaniels* v. *Colvin*, 16 Vt. 300. If the first mortgagees have notice of the intervening second mortgage, and the subsequent advance is not obligatory, it is equally well settled that the second mortgage will not be postponed. *Farr* v. *Nichols*, 132 N. Y. 327; *Union Nat. Bank* v *Moline, Milburn, & Stoddard Co.*, 7 N. D. 201. Insomuch as the joint mortgagees must act in concert throughout the transaction, the court properly looks upon them as a unit, and holds that notice of the second mortgage given to one is equivalent to notice to all.

PERSONS — BURIAL EXPENSES OF INFANT. — *Held*, that the funeral expenses of a deceased minor are not a charge against his estate if he leaves surviving a father able to pay them. *Rowe* v. *Raper*, 54 N. E. Rep. 77 (Ind.).

At common law the husband was liable for the burial expenses of his wife. *Ambrose* v. *Kerrison*, 10 C. B. 776; *Bradshaw* v. *Beard*, 12 C. B. N. S. 344. But since the passage of recent statutes giving married women the power to hold property, there has been a tendency on the part of the courts to hold that the estate of a wife is primarily liable for such expenses. *McClellan* v. *Filson*, 44 Ohio St. 184; *Lightbown* v. *M'Myn*, 33 Ch. D. 575; *Constantinides* v. *Walsh*, 146 Mass. 281. This seems but just, for if one is able to meet expenditures made on this account, he should do so. The right of a minor to hold property being as extensive as that of a married woman, on analogy to the preceding cases, the estate of a deceased infant ought in the first instance to be liable for his funeral expenses. But the court in the principal case bases its decision on the ground that in Indiana a father is liable for necessaries furnished to a minor

child, and on that ground may be supported. Such a liability is not admitted in other jurisdictions. *Sheldon* v. *Springett*, 11 C. B. 452; *Kelley* v. *Davis*, 49 N. H. 187. And there a different result may well be reached. Sch. Dom. Rel., 5th ed., § 242.

PERSONS — SALE OF LUNATIC'S ESTATE — PURCHASER'S LIEN. — The guardians of a lunatic sold his real estate without authority of statute or of a competent court. *Held*, that the heirs of the lunatic can recover the land, subject, however, to an equitable lien of the vendee for the purchase-money paid. *Reals* v. *Weston*, 59 N. Y. Supp. 807 (Sup. Ct., Trial Term).

It is held by the weight of authority that a married woman, who in attempting to convey her real estate has failed to comply with statutory requirements, can recover the land free from any lien of the vendee for the purchase-money paid. *Cahill* v. *Cahill*, 8 App. Cas. 420; *Brown* v. *Pechman*, 53 S. C. 1; *Scott* v. *Battle*, 85 N. C. 184. *Contra*, *Newman* v. *Moore*, 94 Ky. 147. The principal case raises a question hardly to be distinguished from that decided by these authorities, and its doctrine seems scarcely in accord with principle or justice. The vendee can acquire no direct claim to the land in law or equity, since the parties executing the deed lacked the requisite authority to bind the lunatic's estate. Buswell, Insanity, § 105. By making a complete recovery of the land dependent upon repayment of the purchase-money, the court, therefore, accomplishes indirectly what the law does not allow to be done directly, and in effect deprives the lunatic of a protection accorded him by policy of the law. The slight authority that exists on this exact point is opposed to the principal case. *Warden* v. *Eichbaum*, 14 Pa. St. 121.

PROPERTY — DEEDS — DELIVERY. — A deed was given by the grantor to a third person with instructions to return it if the grantor recovered from her present sickness and otherwise to give it to the grantee. *Held*, that this is not a valid delivery. *Williams* v. *Daubner*, 79 N. W. Rep. 748 (Wis.).

The general rule is that the transfer of a deed to a third person, to be later handed over to the grantee, cannot under any circumstances amount to a delivery, if the grantor reserves a power to recall the instrument. *Prutsman* v. *Baker*, 30 Wis. 644; *Stinson* v. *Anderson*, 96 Ill. 373; *Maynard* v. *Maynard*, 10 Mass. 456. If no power of recall is reserved, such a transaction will constitute a valid delivery, although the ultimate delivery to the grantee is made dependent upon the happening of a certain condition. *Ruggles* v. *Lawson*, 13 Johns. 285; *Foster* v. *Mansfield*, 44 Mass. 412. The question in the principal case, then, is, whether the instrument has been put beyond the control of the grantor. Inasmuch as the grantor cannot control her recovery, and has not reserved the power to recall the instrument before recovery, there seems no good reason for holding the delivery invalid. See 11 HARV. LAW REV. 129.

PROPERTY — LANDLORD AND TENANT — DUTY TO REPAIR. — The landlord of an apartment house, employed an independent contractor to repair the roof. Although the landlord had made no express covenant to keep the premises in repair, *held*, that he is liable for damage to a tenant's property caused by negligence of the contractor. *O'Rourke* v. *Feist*, 59 N. Y. Supp. 157 (Sup. Ct., Abb. Div. First Dept.).

By the great weight of authority the landlord of an apartment house is merely bound to use ordinary care in maintaining those portions of the building which remain in his control, in such a manner as not to injure his tenants. Wood, Landlord and Tenant, 846; *Stapenhorst* v. *American Mfg. Co.*, 15 Abb. Pr. N. S. 355; *Toole* v. *Beckett*, 67 Me. 544; *Priest* v. *Nichols*, 116 Mass. 401. It is also well settled that an employer is not responsible for the acts of an independent contractor on any ground of agency, since he has no power to control him in the performance of the work. *Morton* v. *Thurber*, 85 N. Y. 550; *Glickauf* v. *Maurer*, 75 Ill. 289. There was no claim in the principal case that the defendant failed to use ordinary care either in the choice of the contractor or in the adoption of the method and regulations of the work, and it seems, therefore, that the decision is *contra* to the principles adjudicated in the above cases. *Cf. Lutzbacher* v. *Dickie*, 6 Daly, 469. The result, moreover, is to impose upon the landlord an absolute duty to keep the premises in repair, — a liability which is hardly justifiable from the mere relation of the parties.

PROPERTY — LEASE — IMPLIED COVENANT. — *Held*, that while the words "demise" and "grant" imply a covenant for quiet enjoyment, "let" and "lease" do not. *Mershon* v. *Williams*, 44 Atl. Rep. 211 (N. J. Sup. Ct.).

In holding to the old common law distinction between these words the New Jersey court is unquestionably occupying conservative ground, and it has the support of some of the more modern cases. *Barnes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. D. 820; *Lovering* v. *Lovering*, 13 N. H. 513. By the weight of authority in the United States, however, it is held that any words making a lease for a fixed term imply a covenant for

quiet enjoyment. *Avery* v. *Dougherty*, 102 Ind. 443; *Maule* v. *Ashmead*, 20 Pa. St. 482; *Brown* v. *Holyoke Water Power Co.*, 152 Mass. 408. As the distinction taken in the principal case is a purely artificial one, likely to work hardship, this seems the preferable view.

PROPERTY — RIGHT OF SUPPORT — UNSTABLE STRATUM. — The plaintiff and the defendant owned adjoining lots, underlying which was a semi-fluid stratum of asphalt. The defendant excavated on his lot so that the asphalt oozed away from the plaintiff's premises causing subsidence of the surface. *Held*, that the plaintiff can recover for the damage done. *Trinidad Asphalt Co.* v. *Ambard*, [1899] 2 Ch. D. 317. See NOTES.

PROPERTY — RIPARIAN RIGHTS — EXTENT. — The defendent, a riparian proprietor, carried water from a stream beyond the watershed for purposes of domestic use, and the plaintiff, a lower riparian proprietor, was injured thereby. *Held*, that the defendant's natural right does not allow him to take water beyond said watershed for any purpose whatever to the injury of the plaintiff. *Bathgate* v. *Irvine*, 58 Pac. Rep. 422 (Cal., Sup. Ct. Com.). See NOTES.

PROPERTY — WILLS — ADOPTED CHILD. — A will gave property to four persons, and provided that "the shares due such as may be deceased shall go to the children of such deceased person, if there be children." *Held*, that an adopted child takes within this description. *Bray* v. *Miles*, 54 N. E. Rep, 446 (Ind.).

The case presents the question of what is the reasonable interpretation to be put on the word "children" when used by a testator, in the absence of any circumstances of identification. 1 Jar. Wills, 6th Am. ed., 417. The most natural meaning embraces all persons who possess to any considerable extent the attributes of a natural child. An adopted child does possess such attributes, since he stands legally in the position of a natural child as regards rights in his adopted parent's estate. *Power* v. *Hafley*, 85 Ky. 676; *Barnes* v. *Allen*, 25 Ind. 222. The result reached in the principal case seems, therefore, to be the more reasonable one, although what few decisions there are on this exact point take the opposite view. *Schafer* v. *Eneu*, 54 Pa. St. 304; *Russell*, v. *Russell*, 84 Ala. 48.

PROPERTY — WILLS — GIFT TO CLASS. — A testator devised property for life and then to A and the children of B who should attain twenty-one. A died in the testator's lifetime. At the death of the life tenant all of B's children were living and had attained twenty-one. *Held*, that the gift is a gift to a class, and that consequently A's share did not lapse, but went to the children of B. *In re Moss*, [1899] 2 Ch. D. 314.

It has been held that a bequest to A for life, and after that the property "to be equally divided among his surviving children and my niece K. W." was not a gift to a class. *Blakeford* v. *Blakeford*, 33 Beav. 43. A similar construction was put upon a bequest to the children of A and B and ten others. *In re Chapin's Trusts*, 33 L. J. Ch. 183. But, on the other hand, a gift to A and the children of B has been decided to be a class gift. *Aspinall* v. *Duckworth*, 35 Beav. 307. The court, reversing the decision of North, J., said that the authorities were in such confusion that they could not be of much assistance. The ground taken was that where a testator gives property to a class, properly so called, and to an individual or individuals, and there is nothing in the rest of the will to negative the view, it is *prima facie* his intention that the property shall go to such of them as shall be living, and that the gift is really a gift to a class. This reasoning commends itself as sound, and hence the principal case, decided in accord with it, cannot be criticised. *In re Spiller*, 18 Ch. D. 614.

PROPERTY — WILLS — OBLITERATION. — *Held*, that words beneath alterations in a will may be substituted as apparent within the meaning of sec. 21 of the Wills Act, upon proof that they can be deciphered by an expert in handwriting using a magnifying glass. *Goods of Braisier*, [1899] P. D. 36.

In a previous case where a will was offered for probate, a paper, on which was written a bequest, was pasted over a legacy. The court refused to remove it. *Goods of Horsford*, L. R. 3 P. D. 211. Later, the same will was before the court, and it being found that the covered passages could be deciphered by placing a piece of brown paper above the pasted slip and holding the document against a window pane in a darkened room, the court allowed probate of the will in the original form. *Finch* v. *Combe*, [1894] P. D. 191. It was said that chemicals, water, or anything of the kind could not be used, nor could the slips be removed or the document affected in any way. The result of the authorities seems to be that words beneath alterations are "apparent" within the meaning of the Wills Act if they can be deciphered without physical interference with the document itself. *Townley* v. *Watson*, 3 Cur. Ecc. 761. Accordingly, the principal case was correctly decided. *Lushington* v. *Onslow*, 6 N. of Cas. 183.

SURETYSHIP — SUBROGATION — STATUTE OF LIMITATION. — The plaintiff paid a debt as surety for the defendant, and eleven years thereafter brought an action to have the mortgage enforced for his benefit. The statutory limitation for general equitable relief was ten years, and for foreclosure of mortgages fifteen years. *Held*, that the plaintiff is barred under the ten year clause of the statute. *Zuellig* v. *Hemerlie*, 53. N. E. Rep. 447 (Ohio).

This decision affirms the doctrine stated *obiter* in an earlier Ohio case. *Neal* v. *Nash*, 23 Ohio St. 483. In holding that the right of subrogation is purely equitable and independent of the surety's legal rights, the Ohio court takes a position which is certainly preferable to that adopted in some States, where, as soon as the surety's legal remedy on the implied contract of indemnity is barred, *ipso facto* the right of subrogation fails. *Fink* v. *Mahaffy*, 8 Watts, 384; *Junker* v. *Rush*, 136 Ill. 179. The decision, however, is not entirely satisfactory. The court declares that the bill involves two actions, one to get control of the mortgage, the other to enforce it, and that since the preliminary relief is barred under the ten year clause of the statute, the plaintiff must fail. Granting the dual character of the bill, this defendant should not have been allowed to interpose any objection to the preliminary relief, the right to do that resting only with the creditor. Moreover, the view taken in the principal case entails an unnecessary and undesirable limitation on the sound principle that the right of subrogation should not fail till such time as the creditor himself would have been barred, if the surety had not paid. *Kinard* v. *Baird*, 20 S. C. 377; *Sublett's Admr.* v. *McKinney*, 19 Tex. 438. There seems to be no valid reason why payment by the surety should not make the creditor a trustee of the mortgage for him, in which case the statute would not begin to run until the creditor had in some way repudiated his liability.

TORTS — ACTION FOR DEATH — CONTRACT LIMITING LIABILITY. — A gratuitous passenger expressly agreed not to hold the defendant liable for any personal injuries arising from the negligence of its servants. *Held*, that the agreement is no defence to an action brought for his death by the widow and son, though as between the parties it was binding by the law of Washington. *Adams* v. *Northern Pac. Ry. Co.*, 95 Fed. Rep. 938 (Cir. Ct., Wash.).

Under statutes similar to that of Washington, which do not expressly provide that no action can be maintained unless the person killed could recover if alive, the rule is well settled that contributory negligence on the part of the deceased bars the statutory action. *Pennsylvania R. R.* v. *Bell*, 122 Pa. St. 58; *Central, etc. Co.* v. *Kitchens*, 83 Ga. 83. On similar grounds it is held by the weight of authority, in opposition to the principal case, that any contract between the defendant and the deceased which would bar an action by the latter, were he alive, is a good defence to an action under the statute. *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357; *Perkins* v. *New York, etc. Ry.*, 24 N. Y. 196; *Western, etc. R. R. Co.* v. *Strong*, 52 Ga. 461. That this is the correct view admits of little doubt. Though the action given by the statute is not a continuation after death of the injured man's right to sue, yet, as the plaintiffs are recovering for a right they possess in him, it is only just that they should be barred by what bars him. The principal case, however, has some support. *Rose* v. *Des Moines Ry. Co.*, 39 Iowa, 246; *Pennsylvania R. R.* v. *Henderson*, 51 Pa. St. 315.

TORTS — CONTRIBUTORY NEGLIGENCE OF CHILDREN. — *Held*, that a child four and a half years old is incapable of contributory negligence as a matter of law. *Crawford* v. *Southern Ry. Co.*, 33 S. E. Rep. 826 (Ga.).

Held, that a child between seven and fourteen years of age is presumed to be incapable of contributory negligence. *City of Roanoke* v. *Shull*, 34 S. E. Rep. 34 (Va., C. A.).

By the weight of authority an infant who fails to use the degree of care that an ordinarily prudent child of his own age and experience would use under the circumstances, is negligent. *Stone* v. *Dry Dock, etc. Co.*, 115 N. Y. 104; *City of Pekin* v. *McMahon*, 154 Ill. 141; *Philadelphia, etc. Ry. Co.* v. *Hassard*, 75 Pa. St. 357. This rule is just and rational in neither wholly relieving the child, nor holding him to a standard to which he cannot conform. The first of the principal cases is undoubtedly correct within the above rule, for the judge is only exercising his right to exclude from the jury's consideration that which admits of but one reasonable conclusion. *Burkett* v. *Knickerbocker Ice Co.*, 110 N. Y. 504; *Schnur* v. *Citizen's Traction Co.*, 153 Pa. St. 29. The second principal case, however, is inconsistent with the view suggested. Yet it is not without support. *Pratt, etc. Co.* v. *Brawley*, 83 Ala. 371.

TORTS — NEGLIGENCE — STATUTORY DUTY. — A statute imposed upon engineers the duty of giving certain signals at grade crossings. *Held*, that compliance with the terms of the statute relieves the defendant from liability, although he is negligent in giving insufficient signals. *Tessmer* v. *New York, etc. R. R. Co.*, 44 Atl. Rep. 38 (Conn.).

Generally such statutes are regarded as mere police regulations, in no way altering the rule requiring reasonable care. *Whelan* v. *New York, etc. R. R. Co.*, 38 Fed. Rep. 15 (Cir. Ct., Ohio); *Flynn* v. *Canton Co.*, 40 Md. 312. Accordingly, a disregard of them is not considered sufficient proof of negligence without showing its relation to the injury as the proximate cause. *Chrystal* v. *Troy & Boston R. R. Co.*, 124 New York. 519. And in opposition to the principal case, the general rule is that their observance will not excuse if the circumstances demand greater care. *Bradley* v. *Boston & Maine R. R.*, 56 Mass. 539; *Calhoun* v. *Gulf etc. R. R. Co.*, 84 Tex. 226. The latter must be conceded to be the better view. The purpose of these statutes is to add to the safeguards of the public by defining the minimum of care required, rather than to detract from them by lessening the amount of care necessary in some cases. The principal case, however, is not without support. *New York, etc. R. R. Co.* v. *Leaman*, 54 N. J. Law, 202; *Chicago etc. R. R. Co.* v. *Dougherty*, 110 Ill. 521.

TORTS — NITRO-GLYCERINE — ABSOLUTE LIABILITY. — An explosion of nitroglycerine in the defendant's magazine, which occurred in spite of the exercise of due care, injured the plaintiff's building, distant more than a mile. *Held*, that the plaintiff can recover. *Bradford Glycerine Co.* v. *St. Mary's Woolen Mfg. Co.*, 54 N. E. Rep. 528 (Ohio).

Authority is almost unanimous in only imposing an absolute liability on those keeping dangerous explosives, when, by reason of the location and surrounding circumstances, the magazine is a nuisance either public or private. *Heeg* v. *Licht*, 80 N. Y. 579; *McAndrews* v. *Collerd*, 42 N. J. Law, 189; *Laflin, etc. Powder Co.* v. *Tearney*, 131 Ill. 322. Such a magazine is a nuisance if the circumstances are such as to make it a reasonable cause of fear to persons living in the vicinity, *Weir's Appeal*, 74 Pa. St. 230, unless, perhaps, "the location is such as to endanger as few persons and as little property as possible, and yet be reasonably accessible as a point of supply and distribution." *Dilworth's Appeal*, 91 Pa. St. 250. The principal case goes beyond these decisions and imposes on the owner an absolute liability under all circumstances. Such a view is clearly open to the objection that it imposes too severe a penalty upon the conduct of a business which is necessary and beneficial to the public.

REVIEWS.

A TREATISE ON THE LAW OF BANKRUPTCY. By John Lowell and James Arnold Lowell. Boston: Little, Brown, & Co. 1899. pp. cxxxi, 786.

The senior collaborator in this book, first as Judge of the District Court of Massachusetts, and afterwards as Circuit Judge, was charged with the duty of expounding frequently the Bankruptcy Act of 1867 during the entire period which it was in force; and he fairly earned a right to the title of the ablest and clearest judge in bankruptcy matters who ever sat upon the bench in this country. If one may decide from judicial opinions, he was almost alone among our judges in having a thorough and systematic knowledge of English bankruptcy law as a foundation for construing the American statutes, and to this knowledge was added great clearness of thought and of statement.

It is a matter for sincere congratulation that such a man should have embodied the results of his long consideration of bankruptcy law in a treatise. The book consists of two parts, the first by Judge Lowell on bankruptcy law in general, the second by his son, James A. Lowell, on the Bankruptcy Act of 1898. As the first part was written before the latter act was passed, it necessarily discusses the application of bankruptcy law to earlier acts, and the statements of law made in this part are sometimes contrary to the provisions of the present act. Where this is so the junior author has generally called attention to the fact in a note in